81-5379

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CASE NO. A-23

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

Supreme Court, U.S.
FILED
SEP 8 1981
Alexander L. Stevas, Clerk

HENRY PERRY SIRECI,

Petitioner

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

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October Term, 1980

HENRY PERRY SIRECI,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida filed on April 9, 1981; as modified on June 10, 1981.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Florida, Case No. 50,905, is reported at 399 So.2d 964 (Fla. 1981) and is set out in pages 26-34 of the Appendix.*

JURISDICTION

The judgment of the Supreme Court of Florida was filed on April 9, 1981, and rehearing was denied on June 10, 1981; although the opinion was modified (A 25). Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257 (3), Petitioner having asserted below and asserting herein deprivation of rights secured by the Constitution of the United States. On July 28, 1981, Mr. Justice Powell granted an extension of time in which to file a petition for writ of certiorari in the above-entitled cause "to and including September 8, 1981."

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*The symbol "A" followed by the appropriate page number will designate the Appendix filed separately herewith.

QUESTIONS PRESENTED FOR REVIEW

I

WHETHER PETITIONER'S FUNDAMENTAL RIGHT TO REMAIN SILENT AND TO DUE PROCESS OF LAW WERE DENIED BY DIRECT TESTIMONY REGARDING HIS EXERCISE OF HIS RIGHT TO REMAIN SILENT AND TO AN ATTORNEY, VIOLATING THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?

II

WHETHER THE FAILURE OF THE SENTENCING JUDGE TO CONSIDER SUBSTANTIAL EVIDENCE OF PETITIONER'S SEVERE MENTAL PROBLEMS, DENIED PETITIONER A FAIR DETERMINATION ON THE ISSUE OF PUNISHMENT, AND RENDERED THE DEATH SENTENCE DISPROPORTIONATE AS APPLIED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS AND THE EXPRESS COMMANDS OF LOCKETT V. OHIO?

III

WHETHER THE RESTRICTION OF PETITIONER'S RIGHT TO PRESENT EVIDENCE OF NON-STATUTORY MITIGATING FACTORS, AND THE JUDGE'S SPECIFIC LIMITATION OF HIS CONSIDERATION OF MITIGATING CIRCUMSTANCE TO THOSE IN THE STATUTE RENDERED THE EXTREME PENALTY DISPROPORITIONATE AS APPLIED, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS AND THE EXPRESS COMMANDS OF LOCKETT V. OHIO AND GREEN V. GEORGIA?

IV

WHETHER THE FLORIDA SUPREME COURT'S FAILURE TO REMAND THIS CASE FOR RESENTENCING, WHEN ONE OF THE AGGRAVATING CIRCUMSTANCES IS IMPROPER RENDERED THE DEATH SENTENCE DISPROPORTIONATE AS APPLIED, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT V:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a prezentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

AMENDMENT VI:

In all criminal proceedings, the accused enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to

be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT VIII:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV

... nor shall any State deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 921.141, FLORIDA STATUTES (1975)

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence. -

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY. - Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by §775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.- After hearing all the evidence, the jury shall be deliberate and render an advisory sentence to the court, based upon the following matters:
(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (6), which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.- Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:
(a) That sufficient aggravating circumstances exist as enumerated in subsection (5),and
(b) That there are insufficient mitigating circumstances, as enumerated in subsection (6) to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with §775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.- The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) AGGRAVATING CIRCUMSTANCES.- Aggravating circumstances shall be limited to the following:
(a) The capital felony was committed by a person under sentence of imprisonment.
(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.
(c) The defendant knowingly created a great risk of death to many persons.
(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.
(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.
(h) The capital felony was especially heinous, atrocious, or cruel.

(6) MITIGATING CIRCUMSTANCES.-
Mitigating circumstances shall be the following:
(a) The defendant has no significant history of prior criminal activity.
(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
(c) The victim was a participant in the defendant's conduct or consented to the act.
(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.
(e) The defendant acted under extreme duress or under the substantial domination of another person.
(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
(g) The age of the defendant at the time of the crime.

STATEMENT OF THE CASE *

Petitioner was indicted for first degree murder on February 27, 1976 (R 2). On April 13, 1976, Petitioner was determined to be indigent and counsel was appointed (R 11). On the same day, Appellant pled not guilty (R 12). Trial by jury was held on October 18-22, 1976 (T 1-760).

The present case involves the death of Howard Poteet, alleged to have taken place on December 3rd or 4th, 1975 at Poteet's Auto Sales in Orlando, Florida. The testimony at the trial can be classified in four general areas. The first area concerned the discovery of the decedent and the description of the scene. A second area of the testimony encompassed two persons who said they were with Petitioner in late November and early December of 1975. A third area involves the testimony of arresting officers and the fourth area pertained to Petitioner's alleged statements.

Richard Klawe of the Orange County Sheriff's Department testified regarding the crime scene. Mr. Klawe identified several

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*The symbol A will denote the Appendix. The following additional symbols will be used:

R	Record on Appeal
S	Transcript of Advisory Sentencing Procedure
T	Trial Transcript

photographs of the crime scene (T 32-41). Petitioner offered to stipulate to the cause of death and objected to these photographs as unnecessary and prejudicial (T 41-42). The photos were admitted in evidence (T 43-44).

Howard Poteet, Jr., stated that he arrived at Howard Poteet Motors at 7:00 A.M. He described the disarray in the office and identified his father's body. (T-54-55). The decedent's wife, Pauline Poteet, corroborated her son's testimony (T 59-70). She also stated that she later received statements showing the use of the credit cards that had been in the decedent's wallet (T 70).

Dr. Ruiz, Orange County medical examiner, said that the decedent died from multiple stab wounds (T 90). Dr. Ruiz was allowed, over objection, to show a variety of photographs of the body and explain them in great detail (T 90-113).

The second area of testimony consisted of the statements of two persons, Bonnie Arnold and Barbara Perkins, who had allegedly been with Petitioner in late November and early December of 1975. Barbara Perkins said that she met Petitioner on November 2, 1975 when he picked her up while she was hitchhiking (T 147). Petitioner later moved in with her and was living with her on the morning of the alleged homicide (T 149). Perkins testified that on the evening of December 1975, Petitioner came home and said "he was thinking of stealing a car" (T 151). She said that Petitioner wanted her to drive him to a point near a car lot so that he could go in and steal a car (T 152).

Perkins said she took Petitioner to the Rocking Chair Motel at about 5:15 P.M. (T 153) near where he was going to steal a car (T 156). She met Petitioner about 45 minutes later and they returned to her trailer (T 155, 160-161). She also answered a variety of questions concerning Petitioner's habits and lifestyle. She stated that Petitioner had carried knives (T 171). She admitted that she had been convicted of crimes four or five times (T 193).

Perkins also said that Petitioner had discussed the killing with her. According to Perkins, Petitioner had told

her that he had hit the decedent and then he turned around and jumped Petitioner (T 194). He told her that he then began stabbing the decedent (T 194-195). Perkins repeatedly stated that Petitioner had told her that he had only gone to the car lot to steal a car (T 197). Petitioner had never indicated any intention to rob or harm anyone (T 197). She emphasized that there had been no discussion of any violence to be used (T 198). She has never been charged as an accessory, conspirator, or aider and abettor for the present offense (T 222). Perkins admitted that she had forged Mr. Poteet's name on the credit card on a trip to Las Vegas, Nevada (T 223).

Bonnie Arnold also said he was with Petitioner in November and early December of 1975. He met Petitioner while playing pool at a lounge in Orlando in the early part of November of 1975 (T 444). He stated thaton either December 1st or 2nd he went to the Palm Gardens Lounge early in the evening and that he saw Petitioner there at approximately 11:00 P.M. (T 455-447). They stayed at the bar until closing time (which was between 12:00 P.M. and 1:00 A.M.) and then went to Perkins' trailer, where they all spent the night.

Arnold stated that the next day or the day after he had a conversation with Petitioner in which they discussed the alleged homicide (T 452). Petitioner said that he had gone to the car lot to "steal some keys so he could steal a car" (T 453). Petitioner said that he had gotten in a fight with the man (T 453). Arnold said that Petitioner had told him that he had gone to the lot with a tire tool in his boot and had gone there to "talk with the man and see whether he had left the keys and was going to steal the keys and then go back and steal a car" (T 455). Arnold said that Petitioner had gone there with a tire tool that he began getting it out, the decedent began attacking him and they proceeded to fight (T 455-456).

On cross-examination Arnold admitted that Petitioner could have come to the bar well before 11:00 P.M., without his being aware of Petitioner's presence (T 466). Arnold reiterated that Petitioner had told him that he had merely gone to the car lot to steal some keys so that he could steal a car and that

Petitioner had not mentioned robbing or killing anyone (T 471). Mr. Arnold stated that Petitioner had no intention to rob or kill anyone and unexpectedly got into a fight with the owner of the lot (T 473). He testified that Petitioner had never told him about stealing anything from the decedent (T 476).

The third area of testimony involved the arresting and investigating officers in the case. Detective Allen Hansen of the Orange County Sheriff's Department testified that he aided in the execution of a search warrant for an auto in Las Vegas, Nevada (T 259). He identified a jacket given him by Barbara Perkins and personal papers and photographs taken from the car (T 261). Hansen admitted that the seized items were not described in the search warrant (T 265-266).

William Monroe of the Sanford Regional Crime Lab testified about blood stains and hairs on a blue denim jacket. He said that the blood and hairs were consistent with the decedent's but that blood and hairs can not be identified, "absolutely from any individual" (T 37-1-413).

Detective Gary Arbisi of the Winnegago County, Illinois Sheriff's Department testified concerning a conversation with Petitioner on February 6, 1976 at 10:00 P.M. (T 554). Mr. Arbisi was allowed to testify about this conversation, over objection as to the voluntariness of the conversation (T 559, 593-594). Mr. Arbisi said that Petitioner had admitted owning a brown plastic knife and that he knew the decedent (T 597-598).

The fourth area of testimony involved Petitioner's alleged statements. Donald Holtzinger was in the same cell block in the Orange County Jail, with Petitioner (T 278-279) for two weeks in May of 1976 (T 281). Holtzinger claimed that Petitioner asked him to kill Petitioner's brother-in-law, who was also a witness in this case (T 284-287). Holtzinger began to discuss the details of the alleged plan when Petitioner objected and moved for a mistrial (T 287-288). Petitioner objected to this testimony as irrelevant, and highly prejudicial (T 287-288). The Court admitted this testimony, over objection (T 298-304).

Harvey Woodall testified that he was in the same cell with Petitioner in the Winnebago County Illinois jail (T 428-429).

Petitioner told Woodall that he and Barbara Perkins, went to the car lot to "borrow a car to rob a gas station" (T 434). Petitioner said that they could not get the car so they came back later and that Petitioner got into a fight with the owner of the lot and eventually killed him (T 433-434). He claimed that Petitioner had told him that Petitioner had gotten one-hundred and fifty dollars and credit cards (T 436). Woodall admitted that he had been convicted of crimes six different times (T 436).

Petitioner's brother-in-law, David Wilson, testified concerning alleged conversations with Petitioner. According to Wilson, Petitioner had told him the killing had been with a knife (T 497). Wilson knew nothing about the motive of the killing or the circumstances surrounding it (T 497). He testified that Petitioner had never told him of any intention to kill anyone (T 522).

Based upon the foregoing evidence Petitioner was found guilty of first degree murder (T 753-754).

B. Sentencing Phase

The first witness called by the prosecution in the sentencing phase was David Wilson, Petitioner's brother-in-law, He said that Petitioner had been a good worker, had always been polite and that he had never seen him made (S 15-17). He knew that Petitioner had questioned whether his father was his real father (S 21). Harvey Woodall was allowed to testify as to conversations with Petitioner (S 40-43). He stated that Petitioner did not show any remorse and that he did not feel sorry for the man (S 41-43). Woodall admitted that he had been convicted of felonies six times (S 43).

Petitioner, Henry Sireci, testified in his own behalf in the second phase of the trial. Petitioner stated he had changed his name to Butch Blackstone approximately six years before when he found out that his father was not his real father (S 49). Petitioner had been cast out of his home about twelve years before when he had had a discussion about his name with his parents (S 50-51). His mother had called him a liar and several other things (S 51). Petitioner decided that his father was not his real father (S 51). Petitioner went on

his own when he was sixteen and had traveled a lot and worked for several different companies (S 52-53). Petitioner had never been convicted of an offense involving a gun (S 58). Petitioner had been cast out of his home after having many fights with his parents (S 59).

Dr. Robert Kirkland, a psychiatrist, testified concerning Petitioner's mental condition. Dr. Kirkland was struck by Petitiooner's lack of emotional tone (S 77). He also stated that Petitioner shows signs of permanent mental disorders (S 78). He stated that Petitioner had "schizoid trends" but that they had not reached psychotic proportions (S 78). Dr. Kirkland stated:

> "He [Petitioner] is poorly equipped to handle social living, family living, not only because of the underlying character disturbance ...but also because of his past experience with family." (S 80).

Dr. Kirkland also stated that what would be moderate pressure for most persons would be extreme for Petitioner because of his development and character structure (S 81). He stated that Petitioner is unable to control his emotions in a "rational, normal manner" (S 87).

Respondentcalled Dr. Edward Herrera, a psychiatrist, in rebuttal. He stated that he felt that Petitioner suffered from a personality disorder that was sociopathic rather than schizoid (S 98-103).

Based upon the foregoing testimony the jury recommended that Petitioner be sentenced to death (S 147-148). The judge sentenced Petitioner to death in the electric chair (R 294-299).

The Supreme Court of Florida affirmed Petitioner's conviction and death sentence on April 9, 1981 (A 1-13). Petitioner's timely motion for rehearing was denied by the Florida Supreme Court on June 10, 1981 although the original opinion was modified (A 25).

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The federal questions were raised in the trial court by timely objection. On appeal the following issues were raised in the Florida Supreme Court:

I. THE TRIAL COURT ERRED IN ALLOWING TESTIMONY CONCERNING COLLATERAL OFFENSES BECAUSE SUCH TESTIMONY WAS HIGHLY INFLAMATORY AND WAS NOT LOGICALLY RELEVANT.

II. THE REFUSAL TO GRANT A CONTINUANCE WHEN AN ADDITIONAL WITNESS LIST WAS FILED ON THE FIRST DAY OF TRIAL, TO STRIKE THE TESTIMONY OF DONALD HOLTZINGER AND/OR GRANT A MISTRIAL WAS ERROR AND DENIED APPELLANT DUE PROCESS OF LAW.

III. THE TRIAL COURT ERRED IN LIMITING CROSS-EXAMINATION OF A KEY PROSECUTION WITNESS, REGARDING HER CREDIBILITY, AND THUS DENIED APPELLANT DUE PROCESS OF LAW.

IV. APPELLANT WAS DENIED DUE PROCESS OF LAW BY DIRECT TESTIMONY REGARDING APPELLANT'S EXERCISE OF HIS CONSTITUTIONAL RIGHT TO REMAIN SILENT.

V. THE INERESTS OF JUSTICE REQUIRE A REVERSAL OF THIS CONVICTION BECAUSE THE CIRCUMSTANTIAL EVIDENCE IS INSUFFICIENT TO PROVE EITHER PREMEDITATION OR FELONY MURDER BEYOND A REASONABLE DOUBT.

VI. A. APPELLANT WAS DENIED DUE PROCESS OF LAW BY THE STATE'S FAILURE TO NOTIFY THE DEFENDANT, PRIOR TO TRIAL, OF THE AGGRAVATING CIRCUMSTANCES IT INTENDED TO PROVE IN THIS CASE.

B. THE TRIAL COURT HAD NO JURISDICTION TO IMPOSE A DEATH SENTENCE BECAUSE THE INDICTMENT FAILED TO ALLEGE ANY AGGRAVATING CIRCUMSTANCES.

VII. THE EXECUTION OF APPELLANT'S DEATH SENTENCE WOULD DEPRIVE HIM OF LIFE WITHOUT DUE PROCESS OF LAW AND SUBJECT HIM TO CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE UNITED STATES AND FLORIDA CONSTITUTIONS.

A. THE EXTREME PENALTY OF DEATH WAS ASSESSED AGAINST APPELLANT ON THE BASIS OF AGGRAVATING CIRCUMSTANCES THAT WERE NOT PROVEN BEYOND A REASONABLE DOUBT AND/OR WERE IMPROPERLY APPLIED: AND WHERE THE TRIAL COURT IMPROPERLY FAILED TO CONSIDER CERTAIN MITIGATING FACTORS.

B. THE EXTREME PENALTY OF DEATH WAS ASSESSED AGAINST APPELLANT WHERE THE PROSECUTION WAS ALLOWED TO PRESENT EVIDENCE OF NON-STATUTORY AGGRAVATING FACTORS.

C. THE EXTREME PENALTY OF DEATH WAS IMPOSED UPON APPELLANT ON THE BASIS OF THE FLORIDA STATUTE WHICH UNCONSTITUTIONALLY LIMITS THE CONSIDERATION OF MITIGATING FACTORS. APPELLANT WAS IMPROPERLY LIMITED IN HIS PRESENTATION OF MITIGATING EVIDENCE.

D. THE FLORIDA CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED DUE TO THE LACK OF ANY STANDARD FOR WEIGHING THE AGGRAVATING AND MITIGATING FACTORS.

E. APPELLANT WAS DENIED HIS RIGHT TO A FAIR CROSS-SECTION OF THE COMMUNITY BY FLORIDA'S EXEMPTION, ON REQUEST, OF MOTHERS WITH CHILDREN, FROM SERVICE ON JURIES.

F. THE EXTREME PENALTY WAS ASSESSED AGAINST APPELLANT PURSUANT TO FLORIDA'S CAPITAL SENTENCING STATUTE WHICH IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED.

Based upon these issues the Supreme Court of Florida affirmed Petitioner's conviction and death sentence (A 1-13). Petitioner filed a timely motion for rehearing in the Florida Supreme Court wherein the federal issues were again raised (A 14-24). The motion for rehearing was denied, although the opinion was modified (A 25).

REASONS FOR GRANTING THE WRIT

I

PETITIONER WAS DENIED HIS RIGHT TO REMAIN SILENT AND TO DUE PROCESS OF LAW BY DIRECT TESTIMONY REGARDING HIS EXERCISE OF HIS RIGHT TO REMAIN SILENT AND TO AN ATTORNEY, VIOLATING THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

The essential question herein is whether a comment on post arrest silence constitutes fundamental error, which can be reviewed in the absence of an objection.

In the present case a police officer (Detective Nazurchuk) testified concerning the interrogation of Petitioner shortly after he was arrested. He stated that he read Petitioner his rights and that "he requested his attorney"(T 531-532). Nazarchuk stated the interview was then terminated (T 532). This was a direct reference to Petitioner's exercise of his right to remain silent and to an attorney.

The Florida Supreme Court originally held that Petitioner had waived this issue by his failure to object (A 7). The Court relied on Clark v. State, 363 So.2d 331 (Fla. 1978) for this principle (which was decided two years after Petitioner's trial) (A 7). The Court also held that the comment was harmless in light of the entire record (A 7). On Rehearing, the Court

modified its opinion and directed that all references to the harmless error doctrine be deleted (A 25).

Prior to the decision in Clark, supra the Florida Supreme Court had always held a comment on silence to be fundamental error; requiring reversal without consideration of the existence of an objection or of the harmless error doctrine. Bennet v. State, 316 So.2d 41 (Fla. 1975); Willinsky v. State, 360 So.2d 760 (Fla. 1978); Shannon v. State, 335 So.2d 5 (Fla. 1976). This was the rule in effect at the time of Petitioner's trial. Although Clark, supra has imposed the requirement of a contemporaneous objection, no Florida case has ever applied the harmless error rule to a comment on silence.

This Court has consistently held that a comment on a defendant's silence is constitutional error, requiring reversal. As this Court stated in United States v. Hale, 422 U.S. 171, 95 S.Ct. 2133, 45 L.Ed.2d 99 (1975):

> "Respondent's silence during police interrogation lacked significant probative value...any reference to his silence... carried, with it an intolerably prejudicial impact." 422 U.S. at 180.

The inherent prejudice in direct testimony upon a defendant's silence after being given his Miranda warnings has been further developed by this Court in Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976). As the Court stated:

> "Silence in the wake of these [Miranda] warnings may be nothing more than the arrestee's exercise of these Miranda rights. Thus every post-arrest silence is insolubly ambiguous... Moreover, while it is true that the Miranda warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives such warnings." 426 U.S. at 617, 618.

Thus, it is clear that comment upon a defendant's exercise of his right to silence, after his Miranda warnings is fundamentally unfair and inherently prejudicial.

The Fifth Circuit Court of Appeals has specifically held that a comment on silence constitutes fundamental error, which can warrant reversal even in the absence of an objection. United States v. Johnson, 558 F.2d 1225 (5th Cir. 1977);

United States v. Meneses-Davila, 580 F.2d 888 (5th Cir. 1978). (Although these cases discuss the applicability of the harmless error doctrine, Florida has never applied this rule to a comment on silence). Thus the federal courts have clearly held that a comment on silence can be reviewed absent an objection.

Appellant was clearly denied his right to remain silent and to due process of law. The ruling below denying Petitioner's review of this issue is contrary to existing federal case law. Accordingly this Court should grant certiorari to resolve this disharmony, and to prevent a substantial denial of Petitioner's constitutional rights.

II

THE FAILURE OF THE SENTENCING JUDGE TO CONSIDER SUBSTANTIAL EVIDENCE OF PETITIONER'S SEVERE MENTAL PROBLEMS, DENIED HIM A FAIR DETERMINATION ON THE ISSUE OF PUNISHMENT, AND RENDERED THE DEATH SENTENCE DISPROPORTIONATE AS APPLIED, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS AND THE EXPRESS COMMANDS OF LOCKETT V. OHIO.

The question herein involves the trial judge's failure to weigh evidence of Petitioner's severe mental and emotional problems in relation to the statutory mitigating circumstances or as non-statutory mitigating factors under this Court's decision in Lockett v. Ohio, 438 U.S. 586 (1978).

The evidence of Petitioner's mental and emotional problems was substantial and was completely ignored by the trial judge. Petitioner suffered a tremendous emotional shock when he was sixteen years old and he became convinced that his father was not his real father (S21, 49-51). This led to serious conflicts with the restof Petitioner's family, including one incident where his mother called him a liar (S 49-52). Petitioner eventually changed his name to Blackstone because he was certain that his father was not his real father (S 49). This incident and the continuing battles with his family over this issue severely damaged his emotional development.

At approximately the same time that Petitioner was becoming convinced that his father was not his real father, he was in an auto accident in which he suffered severe damage to his head (Deposition of Laura Sireci, 6; Deposition of

Virginia Wilson, 11). Petitioner's sister stated that he never was the same after the accident and that he showed other manifestations of mental disorders (Deposition of Virginia Wilson, 11). The combination of Petitioner's problems with his family and his severe head injury resulted in extreme mental and emotional problems throughout his life.

Petitioner's mental and emotional problems were documented by the testimony of the court-appointed psychiatrists and the statements of his relatives. One of the psychiatrists who examined Petitioner stated:

> "I think he shows certain permanent disorders. He shows some of the symptoms of mental disorder.... I think he does show certain schizoid trends.... and this is an accepted mental disorder." (S 78).

This psychiatrist further described Petitioner's inability to cope with social situations and to handle stress:

> "He is poorly equipped to handle social living, family living, not only because of the underlying character disturbance that I mentioned, but also because of his past experience with family.... I can only state, such individuals as I have described, do not handle pressure very well. (S 81)

This psychiatrist pointed out that the situation that Petitioner found himself in was extreme mental pressure for Petitioner even if it would not have been extreme mental pressure for most people. The other psychiatrist who examoned Petitioner agreed that Petitioner suffered from "a personality disorder" (S 98). Petitioner clearly suffered from a mental or emotional disturbance.

The statements of Petitioner's relatives, especially his sister, substantiate Petitioner's mental problems. It is aciomatic that lay testimony about a defendant's mental condition is admissible if it is based on personal knowledge and observation. Hixon v. State, 165 So.2d 436 (Fla. 2d DCA 1964); United States v. Milne, 487 F.2d 1232 (5th Cir. 1973). The members of Petitioner's family all felt that he had serous mental problems. In fact they decided to help the police find Petitioner because they believed he would receive psychiatric help. (Deposition of Virginia Wilson 7-8).

Petitioner's family was convinced that he had serious mental problems. Petitioner's sister stated that:

> "He is not a normal, sane, ordinary person.... Anybody who knows him, knows he is not normal.... He is not sane. Even an ordinary average person can tell that." (Deposition of Virginia Wilson, 9-10).

Petitioner's sister and brother (Virginia and Peter) firmly believed not only that he had severe mental problems but that he was insane. These were the people who had grown up with Petitioner and who had seen him every day for years. They had the best opportunity to observe the changes that occurred in Petitioner when he became convinced that his father was not his real father and when he received severe head injuries. Petitioner's sister also stated that the only reason his family had not alreay obtained psychiatric help for him was a lack of money (Deposition of Virginia Wilson, 12).

Mental factors are critical in weighing the properiety of the death sentence. The three statutory mitigating circumstances relating to a defendant's mental condition apply in this case. Fla.Stat. §921.141(6)(b)(e)(f)(1975). Subsection (6) states that the fact that the defendant was "under the influence of extreme mental or emotional disturbance" should be considered in mitigation. This subsection is clearly applicable to Petitioner. One of the psychiatrists directly stated that Petitioner was under more mental pressure than he was capable of handling (S 81). He also testified that Petitioner was suffering from a permanent personality disorder (S 78). The other psychiatrist also stated that Petitioner had a personality disorder (S 98).

However, the trial judge incorrectly refused to weigh this factor and stated in his sentencing order that both psychiatrists had said that Petitioner was not under the influence of any extreme mental pressure (R 295-296), as one of the psychiatrists had said thathe was (S 81). The statements of Petitioner's relatives, especially his sister, point to Petitioner being under the influence of a severe mental or emotional disturbance (Deposition of Virginia Wilson, 9-11). The Florida

Supreme Court has stated that his mitigating factor "is easily interpreted as less than insanity but more than the emotion of an average man, however inflamed." [Emphasis supplied] State v. Dixon, 283 So.2d 1, 10 (Fla. 1973). This situation describes Petitioner's condidtion at the timeof this offense. All of the evidence in this case emphasizes the fact that Petitioner suffered from a permanent personality disorder and that he suffered from an extreme mental disturbance.

Subsection (e) of the statute states that the fact that the defendant acted under "extreme duress" should be considered in mitigation. Fla.Stat. §921.141(6)(e)(1975). This mitigating factor applies to Petitioner. Petitioner was under more pressure than he was capable of handling and this was certainly extreme duress in the light of Petitioner's past history and continuing personality disorders.

Subsection (f) should be considered in mitigation. Fla.Stat. §921.141(6)(f)(1975). The Florida Supreme Court has recognized that this subsection is designed to cover a "mental disturbance which interferes with but does not obviate the defendant's knowledge of right and wrong." State v. Dixon, supra, 283 So.2d at 10. The functionof this mitigating circumstance is to provide some mitigation of sentence for a person who is legally sane but has mental problems short of insanity:

> "Like subsection (b), this circumstance is provided to protect that person, who, while legally answerable for his actions, may be deserving of some mitigation of sentence because of his mental state." Id.

Petitioner's mental disorders seriously impaired his ability to conform his conduct to the law, according to the testimony of Dr. Kirkland who testified that Petitioner had a schizoid personality (S 78). The following exchange then took place.

> "Q. Would the person having a schizoid personality be unable to control his emotions in a rational normal manner as we know them?

A. Yes, sir.

Q. And would he be more likely to do an act which would be cruel?

A. Well, I think, he is more likely to be peculiar, eccentric, odd, and his actions I think, he lacks, let's say, the depth of personality that is involved in controlling our behavior." [Emphasis supplied] (S 87).

While Dr. Herrerra thought that Petitioner's personality disorder was more sociopathic than schizoid, he also stated that Petitioner suffered from a personality disorder that made it difficult for him to, "conform to the way of society" (S 99). The evidence establishes each of the three statutory mental factors in mitigation. However, the trial court refused to consider these factors.

Assuming arguendo, that evidence does not establish any of the statutory mitigating factors, this evidence must still be given "independent mitigating weight". Lockett v. Ohio, 438 U.S. 586, 604-605 (1978). The trial judge gave no consideration to this evidence. The Florida Supreme Court recognized that Petitioner suffered from psychological problems specifically personality disorders (A 33). The Florida Supreme Court held that these factors do not need to be considered in mitigation. This is directly contrary to this Court's mandate in Lockett, supra. Petitioner's death sentence is disproportionate as applied due to this error of constitutional magnitude.

III

THE TRIAL JUDGE'S SPECIFIC LIMITATION OF HIS CONSIDERATION OF MITIGATING CIRCUMSTANCES TO THOSE IN THE STATUTE AND RESTRICTION OF PETITIONER'S RIGHT TO PRESENT EVIDENCE OF NON-STATUTORY MITIGATING FACTORS RENDERED THE EXTREME PENALTY DISPROPORTIONATE AS APPLIED, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS AND THE EXPRESS COMMANDS OF LOCKETT V. OHIO AND GREEN V. GEORGIA.

This issue involves the trial judge's specific limitation of his consideration of mitigating factors to those in the statute and the restriction of Petitioner's presentation of evidence of non-statutory mitigating factors. The judge began his Findings of Fact with the following language.

"As directed by Florida Statutes 921.141(3) the Court has weighed and applied the total evidence received to the legislatively mandated criteria of "aggravating" and

"mitigating" circumstances." (R 24).

The sentencing judge expressly limited himself to the statutory mitigating factors and refused to take into account any evidence of non-statutory mitigating factors, such as Petitioner's problems with his parents, the fact that he had been forced out of his house at an early age and had led the outcase life of a "vagabond". (See Point II supra).

This restriction by the judge is directly contrary to the mandate of this Court as expressed in Lockett, supra and Proffitt v. Florida, 428 U.S. 242 (Fla. 1976). This Court has held that any evidence in mitigation, which in any way relates to the defendant's character or record, the circumstances of the offense, or the appropriateness of the penalty of death, must be given" independent mitigating weight". Lockett v. Ohio, 438 U.S. 586, 604-605 (1978).

In Lockett, supra this Court specifically discussed Florida's capital felony statute:

> "Although the Florida statute approved in Proffitt contained a list of mitigating factors, six members of this Court assumed in approving the statute, was not exclusive.... None of the statutes we sustained in Gregg and the companion cases clearly operated at that time to prevent the sentencer from considering any apsect of the defendant's character and record or any circumstances of his offense as an independently mitigating factor." [Emphasis Supplied]. 438 U.S. at 606.

When this Court upheld the Florida statute it was on the assumption that the statutory mitigating factors were not exclusive. See also Proffitt v. Florida, supra, 428 U.S. at n. 8.

The judge not only limited his consideration of mitigating circumstance, but prohibited Petitioner from introducing evidence pointing to innocence in the sentencing phase of the trial (S 53-56). This was an improper limitation of the consideration of mitigating factors. Some doubt (even if it is less than "reasonable doubt") about the defendant's guilt is recognized as a mitigating factor. The possibility of executing an innocent person, however slight that possibility may be, is clearly a factor to be considered in deciding

if the death penalty is proper. The Florida Supreme Court has noted this consideration in Alford v. State, 307 So.2d 433 (Fla. 1975) in affirming the death sentence:

> "Additionally, the evidence of defendant's guilt in these crimes was particularly strong, discounting the possibility of an 'innocent' man being sentenced to die." Id. at 445.

The Florida Supreme Court has recognized that the lack of doubt about a defendant's guilt is a factor to be considered in deciding whether to affirm a death sentence.

The Florida Supreme Court has also recognized this factor in reversing the Petitioner's death sentence in Taylor v. State, 294 So.2d 648, 652 (Fla. 1974). Accordingly, doubt about the defendant's guilt is a mitigating factor (even if it does not rise to a level mandating a judgment of acquittal. Petitioner should have been allowed to introduce evidence which would raise some doubt about his guilt and he was denied this right (S 53-56). This Court has held evidence pointing to doubt about guilt to be admissible in the sentencing phase, even where state evidentiary rules had prohibited it. Green v. Georgia, 442 U.S. 95 (1979).

Therefore, the judge's specific restriction of his consideration of mitigating factors to those in the statute and his restriction of evidence of non-statutory mitigating factors, rendered Petitioner's death sentence disproportionate.

IV

THE FLORIDA SUPREME COURT'S FAILURE TO REMAND THIS CASE FOR RESENTENCING WHEN ONE OF THE AGGRAVATING CIRCUMSTANCES IS IMPROPER, RENDERED THE DEATH SENTENCE DISPROPORTIONATE AS APPLIED, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

This issue involves the Florida Supreme Court's application of a harmless error rule when Elledge v. State, 346 So.2d 998 (Fla. 1977) when it holds an aggravating circumstance to be improper, but finds no mitigating circumstances.

The Florida Supreme Court conceded in its own opinion that the trial judge improperly doubled the aggravating circumstances of robbery and pecuniary gain, but held that this error

does not require resentencing. This is clearly violative of the constitutional requirements laid out by the Fifth Circuit Court of Appeals in Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980). In Stephens, supra the trial court had found three aggravating circumstances and the Fifth Circuit Court of Appeal found one of them to be invalid. Id. at 405-406. The Court remanded for resentencing, stating:

> The question presented, then, is whether the death penalty was invalid under the Constitution because it was imposed when one of the aggravating circumstances was later held to be unconstitutional even though there were two other aggravating circumstances either of which by itself would be legally sufficient to permit the jury to impose the death penalty and as to both of which there is no uncertainty.
>
> In Strongberg v. California, 283 U.S. 359, 367-68, 51 S.Ct. 532, 535, 75 L.Ed. 1117 (1931), the Supreme Court held that if the jury has been instructed to consider several grounds for conviction, one of which proves to be unconstitutional, and the reviewing court is thereafter unable to determine from the record whether the jury relied on the unconstitutional ground, the verdict must be set aside. Accord, Bachellar v. Maryland, 397 U.S. 564, 570-71, 90 S.Ct. 1312, 1315-16, 25 L.Ed.2d 570 (1970); Street v. New York, 394 U.S. 576, 585-88, 89 S.Ct. 1354, 1362-63, 22 L.Ed.2d 572 (1969); Yates v. United States, 354 U.S. 298, 311-12, 77 S.Ct. 1064, 1072-73, 1 L.Ed.2d 1356 (1957). This settled principle of law applies with particular force in cases in which the death penalty has been imposed. Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), held that the death penalty may not be imposed under sentencing procedures that create a substantial risk that the penalty will be inflicted in an arbitrary and capricious manner. The Constitution requires that the sentencer's discretion be channeled by clear and objective standards that "make rationally reviewable the process for imposing a sentence of death." Woodson v. North Carolina, 428 U.S. at 303, 96 S.Ct. at 2990 (opinion of Stewart, Powell and Stevens, JJ.).
>
> It is impossible for a reviewing court to determine satisfactorily that the verdict in this case was not decisively affected by an unconstitutional statutory aggravating circumstance. Id. at 406.

The Court took this position without regard to the presence or absence of mitigating circumstances. Indeed, there is nothing in the record to suggest the presence of mitigating circumstances.

Thus the mandate of Stephens, supra and of this Court's decision in Stromberg v. California, 283 U.S. 359 (1931) clearly require resentencing when any of the aggravating circumstances are improper, regardless of the presence of mitigating circumstances. The failure to remand for resentencing is especially egregious in the present case, where the trial judge ignored evidence of Petitioner's severe mental problems.

CONCLUSION

This case involves significant constitutional right, including the right to remain silent, to due process of law, and the application of Florida's death penalty statute. The ruling below collides with these constitutional guarantees and review by this Court is necessary to resolve this disharmony. For these reasons the Court should grant this Petition for Writ of Certiorari.

Respectfully submitted,

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